90-1909

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Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES
October Term, 1990
No.

Eve White, a/k/a, Eve Cascio,

Petitioner,

vs.

State of Minnesota,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF MINNESOTA

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Questions Presented

1. May the state, consistently with the First and Fourteenth Amendments to the United States Constitution, impose absolute criminal liability upon the producer, director, or publisher of a film, book, magazine or live stage performance, for violating a child pornography statute, regardless of Petitioner's knowledge or scienter as to the minority of the performer involved?

2. May the state, consistent with the Due Process Clause of the Fourteenth Amendment of the United States Constitution, impose felony criminal liability for violating a child pornography statute, in the absence of mens rea?

a. Does the state violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it imposes criminal liability upon Petitioner for violating a child pornography statute, in light of undisputed evidence that Petitioner relied upon the state's own representations as to the age of the performer involved?

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Opinions Below

Review is sought of the decision of the Minnesota Supreme Court entered March 15, 1991, denying Petitioner's Petition for Review. The decision is unreported and is set forth in the Appendix at A.87. The Minnesota Supreme Court refused to grant review of the decision of the Minnesota Court of Appeals in State v. White, 464 N.W. 2d 585 (Minn. App. 1990).

Jurisdiction

Review is sought of the decision of the Minnesota Supreme Court entered March 15, 1991. Jurisdiction is based upon Title 28 U.S.C. Section 1257(a).

Constitutional and Statutory Provisions Involved

This case involves the First and Fourteenth Amendments to the United States Constitution, and Minnesota Statutes Section 617.246, the texts of which are set forth in the Appendix at A.88 - A.91.

Statement of the Case

Petitioner in the above-entitled matter was charged by formal complaint with a single count of using a minor in a sexual performance, in violation of Minnesota Statutes Section 617.246, Subd. 2, which provides, in pertinent part, as follows:

> "It is unlawful for a person to promote, employ, use or permit a minor to engage in or assist others to engage in posing or modeling alone or with others in any sexual performance if the person knows or has reason to know that the conduct intended is a sexual performance." [1]

Subdivision 5 of the same section also provides as follows:

> "Neither consent to sexual performance by a minor or the minor's parent, guardian, or custodian nor mistake as to the minor's age is a defense to a charge of violation of this section."

On August 3, 1989, Petitioner brought a motion in the District Court seeking to dismiss the criminal complaint, inter alia, on the ground that Minnesota Statutes Section 617.246, in particular, Subd. 5, precluding a defense as to reasonable mistake as to age was unconstitutional, in that it violated both the First Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. A copy of said Motion to Dismiss is set forth in the Appendix at A.21 - A.24.

On October 10, 1989, the District Court, by the Honorable Jack Litman, issued an Order and Memorandum denying Petitioner's motion in all respects. A copy of said Order and Memorandum is set forth in the Appendix at A.42 - A.52.

The matter was tried before Judge Litman to a jury, beginning January 22, 1990.

At trial, Duluth Police Officer John Christianson testified that he went to the Wabasha Bookstore in Duluth, Minnesota, on May 5, 1989, in response to information from the Woodland Hills Juvenile Center then an underage female by the name of Rachelle Reynolds was working at the Bookstore as a nude dancer (T.36). He testified that he went to the bookstore knowing Rachelle Reynolds' name and having a photograph of her (T. 37). He testified that after observing Ms. Reynolds engage in conduct which included the fondling of her breasts, the exhibition of her genitals, and the stroking of her pubic area (T. 44), he later confronted Ms. Reynolds (T. 47 - 48).

He testified that Rachelle Reynolds identified herself to him as "Sheryl Reynolds" and gave him an official State of Minnesota identification bearing the name "Sheryl Reynolds" (T. 49). He then testified that, with the Minnesota identification in his possession, he inquired of Rachelle Reynolds as to her name, address, and date of birth, and that Rachelle Reynolds responded with the name, address, and date of birth contained on the identification card (T. 49, 56-57).

Despite the facially valid identification, Officer Christensen said

to Rachelle Reynolds, "You're not Sheryl, you're Rachelle," which Rachelle Reynolds admitted (T. 49). She also admitted to beign only 17 years of age as opposed to the 26 years of age indicated on the identification card. (T. 49). Christensen testified that Rachelle Reynolds had no other identification and was placed under arrest for misrepresenting her age to a police officer (T.49).

Rachelle Reynolds testified that her date of birth was April 16, 1972, making her 17 years of age on the date of her arrest on May 5, 1989 (T. 67, 71).

She testified that she had sister: Sheryl, 26 years of age, born on January 26, 1963. Rachelle Reynolds testified that she obtained the false identification she presented to Officer Christensen by stealing her sister Sheryl's birth certificate from her father's filing cabinet, taking her sister's birth certificate to the Hennepin County Library, falsely representing herself to be Sheryl Reynolds, and receiving an official Minnesota identification bearing her photograph, but her sister's name and date of birth (T. 106). She testified that at no time did any Hennepin County official ever question whether she was in fact Sheryl Reynolds, with a date of birth of January 26, 1963 (T. 107).

Rachelle Reynolds testified that her purpose in obtaining the

false identification in the name of her sister Sheryl was to get into bars to buy liquor, and to get employment as a dancer in a bookstore, since she knew that she would be unable to do so unless she could prove she was 18 years of age (T. 109 -110).

Rachelle Reynolds testified that she sought employment as a dancer at an adult bookstore at Chicago and Lake Street in Minneapolis. (T. 73-74). She testified that she was interviewed for employment by Petitioner Eve White (T. 77). She testified that Petitioner, during the interview, immediately asked her to produce identification showing proof of age, to which she responded with the official State of Minnesota I.D. issued in the name of her sister Sheryl (T. 79). She also testified that Petitioner also requested a second identification to verify the first one, in particular, a Social Security card (T. 80). Rachelle Reynolds responded by representing that her Social Security card was at home, and stating that she would call back with a Social Security number, which she did. She testified she called back and gave a false Social Security number, switching two numbers on her own Social Security number (T. 80). In addition she was told to fill out and sign a W-4 form for tax purposes (T. 82).

At the conclusion of the state's case, Petitioner moved to dismiss

the complaint, inter alia on the ground that the evidence plainly established that Petitioner operated under a reasonable mistake of fact, to-wit: mistake as to Rachelle Reynold's identity, as opposed to Rachelle Reynold's age, specifically excluded as a defense under the statute. (T. 211).[2] The motions were denied (T. 219).

Testifying in her own defense, Petitioner testified that her efforts at verifying the age of Rachelle Reynolds were the same that she used with all of her dancers, including demanding a Minnesota Drivers License or an official State of Minnesota identification (T. 415). In addition, she testified that she would customarily take the identification, say that she did not have her glasses and could not read it, and ask the applicant to repeat her name, address, and date of birth, so that she could verify the information given against that in the identification (T.457).[3] In addition, applicants were made to complete and sign a W-4 form, and the signature on the form was then matched against the signature on the identification card (T. 457 - 458). Obviously this checked out as well, since the false identification card bearing Rachelle Reynolds' sister's name and date of birth also bore both Rachelle Reynolds' photograph and signature.[4]

On January 26, 1990, the jury rendered a verdict of guilty on the

offense charged

(T. 575).

On February 5, 1990, Petitioner brought a Motion for Judgment of Acquittal notwithstanding the verdict, and alternative motion for new trial, alleging, inter alia, that a defense as to mistake of identity was constitutionally compelled, in that the Due Process Clause of the Fourteenth Amendment precluded the state from prosecuting Petitioner when Petitioner undi. putably relied upon the state's own representations, through its official identification card, as to the performer's identity and age. A copy of said motion is set forth in the Appendix at A.53 - A.55. On February 23, 1990, said motions were denied in their entirety by Judge Litman. See sentencing transcript at p. 11. The judgment of conviction was affirmed by the Minnesota Court of Appeals on December 31, 1990. See State v. White, supra, 464 N.W. 2d 585 (Minn. App. 1990). On March 15, 1991, the Minnesota Supreme Court denied Petitioner's Petition for Review.

Petitioner now seeks a Writ of Certiorari.

Argument

I. The decision of the Minnesota Supreme Court upholding the constitutionality of a child pornography statute imposing absolute criminal liability upon a Defendant regardless of his knowledge or

scienter as to a minor's age is in direct conflict with applicable decisions of this court and at least one United States Court of Appeals, requiring review under Rule 10(b) of this Court.

A. The decisions of this Court compel invalidation, under the First Amendment, of a statute which imposes absolute criminal liability for child pornography upon a Defendant, regardless of scienter as to the minor's age.

As already noted, supra, Minnesota Statutes Section 617.246, Subd. 5 provides that a genuine, good faith mistake as to a minor's age is not a defense to prosecution under the statute. This means that the producer of a book, magazine, or motion picture film can take every reasonable step to assure that a participant in his or her production is over the age of 18, but that if a minor is used in such production, absolute criminal liability will be imposed regardless of the Defendant's good faith, mistake, or lack of knowledge. The decisions of this Court plainly hold that such an imposition of absolute criminal liability, regardless of the scienter of the Defendant, violates the First and Fourteenth Amendments to the United States Constitution.

Simply stated, as this Court has reiterated in every First Amendment decision on this point for many decades, strict liability (civil or criminal) may not be imposed for expressive conduct. Because of the inevitable chilling effect strict liability casts over the exercise of free

expression, Smith v. California, 361 U.S. 147, (1959), our Constitution does not permit a regime under which the speaker or artist must assume the risk of criminality or civil liability arising from the creative or communicative conduct. To safeguard the fundamental right of free expression, a Defendant must, on the contrary, be shown to have known the facts which left his or her communication unprotected by the First Amendment.

In Smith v. California, supra, 361 U.S. 147 (1959), this Court struck down an ordinance construed as imposing strict criminal liability upon a bookseller for possession of an obscene book. This Court indicated that on general due process grounds, such an abrogation of the mens rea requirement was suspect, 361 U.S. at 1509, but held more particularly that under the First Amendment, the ordinance "has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution." Id. at 155.

Although the states may legitimately punish obscenity as unprotected speech, the Court noted that:

> "Roth does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had no notice of the character of the

books they sold." Id. at 152.

Faced with strict criminal liability, a bookseller

> "will tend to restrict the books he sells to those he has inspected; and thus, the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature... The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship affecting the whole public, hardly less virulent for being privately administered." Id. at 153-154.

The rationale of Smith was also adopted and further developed in the landmark decision of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), in which this Court held a public figure could not recover damages for a defamatory publication related to official conduct in the absence of proof that the statement was made with "actual malice" -- i.e., knowledge that it was false or with reckless regard as to its truth or falsity. Such a heightened burden of proof is required, the Court observed, so that "debate on public issues should be uninhibited, robust and wide open," 376 U.S. at 270, and not subjected to a "pall of fear and timidity imposed upon those who would give voice to public criticism." Id. at 278. As this Court had noted in Smith, the paramount concern is

that abuses of the rights of free speech in press not be subjected to sanctions, either civil or criminal, so severe as to chill the legitimate exercise of those freedoms. The threat of "libel judgments virtually unlimited in amount...leads to a ...'self-censorship,'" comparable to the imposition of strict criminal liability in Smith, and would make speakers "tend to make only statements which 'steer far wider of the unlawful zone.'" Id. at 279, quoting Speiser v. Randall, 357 U.S. 513, 526, (1958).

Similarly, Ginsberg v. New York, 390 U.S. 629, 643-44, (1968), upheld a New York statute under which "knowing" sale of obscene materials to minors was defined to include:

> "'reason to 'know' or 'a belief or ground for belief which warrants inspection or inquiry of both: (i) the character and content of any materials described which is reasonably susceptible of examination by the Defendant and (ii) the age of the minor.'"

The statute in Ginsberg thus required the state to prove at least negligence on the part of the Defendant in failing to ascertain whether a customer was of legal age, and furthermore provided a defense of reasonable mistake as to the minor's age.

The common theme in all of these decisions that in order to impose either criminal or civil liability upon a Defendant for expressive activity which falls outside the protection of the First Amendment,

Government is obligated to make some showing that the Defendant possessed knowledge or scienter of the facts which led the expressive activity to fall outside First Amendment protection. Thus, in the area of obscentity, under Smith v. California, supra, 361 U.S. 147 (1959), a Defendant must be shown to have knowledge of the content and character of the work, since it is the content and character of the work which would render it outside the protection of the First Amendment. Likewise, in New York Times v. Sullivan, supra, 376 U.S. 254 (1964), knowledge of falsity or reckless disregard for the truth is required, since it is the falsity of the alleged defamatory statement which brings it outside the protection of the First Amendment. In the most analagous situation, Ginsberg v. New York, supra, 390 U.S. 629 (1968), both knowledge of the content of the material sold to minors, and at least negligence as to the minority of the customer was required, since both the content of the material in question and the age of the recipient were necessary to bring the material outside First Amendment protection.

Although this Court has not directly ruled on the issue, in at least two decisions relating to the child pornography exception to the First Amendment, this Court has strongly implied that some measure of knowledge or scienter as to the age of the performer is constitutionally

mandated in order to impose criminal liability for child pornography. In New York v. Ferber, 458 U.S. 747 (1982), the decision in which this Court pronounced, for the first time, a child pornography exception to the First Amendment, this Court upheld the statute which required, as an essential element of the offense, that the Defendant knew the character and content of the performance and materials, and more importantly, provided an affirmative defense of good faith belief that the minor was of legal age. In upholding the statute, the United States Supreme Court stressed that the usual First Amendment limitations apply to the definition and punishment of child pornography as unprotected speech, to-wit: the prohibited conduct must be adequately defined and delimited and, as in the case of obscenity, "criminal responsibility may not be imposed without some element of scienter on the part of the Defendant." 458 U.S. at 465.

More recently, in Osborne v. Ohio, __ U.S. ___, 110 S.Ct. 1691 (1990), this Court rejected a challenge to Ohio's child pornography statute on scienter grounds, not because it held scienter as to a minor's age not constitutionally required; rather this Court found that the Ohio Statute could be construed to include an element of scienter, since the Ohio statute required reckless as the element of mens rea. See Id. at

1698.

Moreover, this Court explicitly held that due process required that the jury be instructed on the state's burden of proving scienter, rejecting the Defendant's contention that no such instruction was given, only because Defendant waived the argument by failing to request such an instruction. See Id. at 1703.

The reasons advanced by the Minnesota Court of Appeals for rejecting the clear mandates of this Court are unpersuasive at best.

First of all, the court reasoned that the statute does not eliminate scienter altogether, because the statute, in Subd. 2, "specifically requires that a person subject to its enforcement must know or has reason to know that the conduct intended is a sexual performance." 464 N.W. 2d at 588. What this argument ignores is the fact that the scienter required by Subd. 2, to-wit: the sexual nature of the performance, does not require that the Defendant have any knowledge of facts which would bring the performance outside the protection of the First Amendment. Unless the performance is legally obscene under Miller v. California, 413 U.S. 15 (1973), or involves a minor, under New York v. Ferber, supra, 458 U.S. 747 (1982), nothing about the fact that the performance involved sexual conduct as defined by statute brings the material outside the

purview of First Amendment protection. As already noted, supra, knowledge of the facts bringing material outside the protection of the First Amendment has been constitutionally mandated in every First Amendment case decided by this Court since Smith v. California, supra, 361 U.S. 147 (1959). See, in particular, Ginsberg v. New York, supra, 390 U.S. 629 (1968), requiring knowledge of both the contents and character of the material and at least neglience as to the age of the distributee, since it was only distribution to minors which rendered the conduct outside the protection of the First Amendment.

Secondly, the Court of Appeals reasoned, without support in the record or in logic, that the statute "deters only a limited amount of conduct." Id. at 589. In fact, rather than requiring an "exhaustive investigation" of a minor's age (Id. at 589), what the statute does is assure that no investigation, regardless of how thorough, how exhaustive, or how in good faith, will never constitute a defense, if a minor is accidently hired. Clearly if this is the law, the only way that one can ever assure compliance with the law is to hire no one to engage in nude dancing, clearly suppressive of First Amendment activity.

Finally, the Court of Appeals argued that violation of First Amendment principles is necessary because of the state's strong interest

in the protection of children. Id. at 589. In fact, the statutory provision does not protect children in general, but only a limited class of fraudulent 16- or 17-year olds, who pass themselves off as adults. Because good faith is no defense, the statutory provision punishes, not the unscrupulous child pornographer, who could not benefit from a reasonable mistake as to age defense in any event, but rather only the conscientious promoter of First Amendment activities who conscientiously attempts to comply with the law. The state's interest in "protecting" only the guilty at the expense of only the innocent was not articulated by either Respondent below or the Court of Appeals in its opinion. Petitioner asserts that it is either minimal or non-existent.

B. The decision of the Minnesota Supreme Court in upholding the validity of the Statute on First Amendment grounds is also in direct conflict with the decision of the United States Court of Appeals for the Ninth Circuit.

In addition to being in direct conflict with the applicable decisions of this Court regarding scienter in First Amendment cases, the Minnesota Supreme Court's decision is also in direct conflict with the decision of the United States Court of Appeals in United States v. United States District Court, 858 F. 2d 534 (9th Cir. 1988), in which the court authoritatively construed the Federal Child Pornography Statute to permit a Defendant

to produce mistake as to age as an affirmative defense to a child pornography charge, as a requisite to the constitutional validity of the statute. The court reasoned that in the absence of a mistake as to age defense, the Federal Child Pornography Statute would be unconstitutional. After citing the scienter requirements constitutionally mandated in Smith v. California, supra, 361 U.S. 47, (1959); Hamling v. United States, 418 U.S. 87 (1974); Ginsberg v. New York, supra, 390 U.S. 629, (1968); Mishkin v. New York, supra, 86 S.Ct. 958, (1966); and New York v. Ferber, supra, 458 U.S. 747, the court stated:

> "We read these Supreme Court cases as holding that a speaker may not be put at complete peril in distinguishing between protected and unprotected speech. Otherwise, he could only be certain of avoiding liability by holding his tongue, causing him 'to make only statements which "steer far wide [] of the unlawful zone."' [Citation omitted.]' As the Court noted in this Term, 'a rule that would impose strict liability on a publisher for [unprotected speech] would have an undoubted "chilling" effect on speech... that does have constitutional value' [citation omitted.]
>
> Section 2251(a) will have precisely this effect, Defendants tell us, unless they are permitted to present a reasonable mistake of age defense. They point out that an actor's chronological age cannot be precisely ascertained from his appearance. Some 16- or 17-year-olds may look older and more sophisticated than their peers; 19-or 20-year-olds may look youthful and immature. The Court recognized as much in Ferber when it noted that 'if it were necessary for literary or artistic value, a person over the statutory

> age who perhaps looked younger could be utilized.' 458 U.S. at 763. Age may also be ascertained on the basis of other evidence: birth certificates, driver's licenses or other identification; statements of those acquainted with the actor; reputation in the community. But Defendants, argue, none of these sources is infallible: documents can be, and frequently are, forged; people can be mistaken or lie; reputations may be based on unfounded rumor rather than fact." Id. at 529 - 540.

Plainly, the instant case is a perfect example of the "chilling effect" that the imposition of absolute liability would have upon protected speech. Despite the fact that both the United States Supreme Court and Minnesota Supreme Court have held nude dancing to be a form of constitutionally protected expression,[5] it is absolutely clear that the only way that Petitioner could have assured herself of avoiding criminal liability altogether would have been to hire no one to engage in nude dancing. As correctly noted by the Ninth Circuit, any and all documentation they could have secured to ascertain a dancer's age could have been forged and done so quite convincingly, as was the minor's identification in the instant case. Clearly, the net effect of imposing absolute criminal liability upon anyone who hires a nude dancer, who turns out to be a minor, regardless of the efforts taken to ascertain the minor's age, must necessarily be to assure that no one is ever hired to engage in nude dancing, despite the fact that the conduct is

constitutionally protected.[6]

II. Apart from First Amendment considerations, the Minnesota Supreme Court's upholding of the statute in question on due process grounds conflicts with both decisions of this court and Courts of Appeals, within the meaning of Rule 10(b) of the rules of this court.

It is an essential concept of our Anglo-American philosophy of criminal jurisprudence that a serious crime requires both a guilty act (actus reus) and a guilty mind (mens rea). "Crime [is] a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand," as this Court noted in the leading case of Morissette v. United States, 342 U.S. 246, 251 (1952). Although a distinction has arisen in modern times for offenses of a regulatory nature, which are malum prohibitum rather than malum in se and which entail neither severe criminal penalties nor grave damage to reputation, this Court has never upheld the imposition of strict liability for a serious felony offense like that created by Section 617.246. On the contrary, this Court and lower courts have indicated on numerous occasions that due process prohibits elimination of criminal intent as an element for such an offense.

The Supreme Court recognized in Morissette, supra, that the absence of a scienter requirement as to any fact necessary to make the

conduct subject to the criminal sanction created strict liability. In order to be convicted under the federal larceny statute at issue in Morissette, the Defendant had to be shown to have committed "knowing conversion," which the Court interpreted as requiring "more than knowledge that Defendant was taking the property into his possession. He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion." 342 U.S. at 270-271. Thus the Defendant could not have been convicted in the absence of knowledge that the property of which he took possession was capable of being converted, and so the Court implicitly held the Defendant should have been allowed to introduce evidence he thought the property was abandoned. Otherwise, the Court indicated, the Defendant could be convicted in the absence of any guilty knowledge or mens rea, a result incompatible with fundamental tenets of criminal jurisprudence which have emerged from centuries of common-law wisdom.

Noting that in the industrial era, a new class of regulatory offenses had developed for which criminal intent was not always required, this Court carefully distinguished such malum prohibitum offenses, along the lines of "health and safety" or "public welfare" regulation, from serious crimes. These regulatory offenses are distinguished by the facts

that "penalties commonly are relatively small, and conviction does not grave damage to an offender's reputation," in contrast to crimes for which "the penalty is high and...the infamy is that of a felony." Id. at 256, 260.

This distinction is central to the Morissette analysis of the due process limitations of strict liability. Because the Court in Morissette was able to avoid the constitutional question and to hold that "mere omission...of any mention intent will not be construed as eliminating that element," the Court left open the question of "a precise line or... comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not." Id. at 263, 260. This Court has subsequently had occasion to construe silent or ambiguous statutes to require an element of criminal intent, most recently in Liparota v. United States, 471 U.S. 419, (1985), but has never squarely faced the question of a statute creating strict liability for a serious felony. Clearly, however, congressional power to eliminate mental culpability for serious crimes is limited by due process, as the Court suggested in Morissette and reaffirmed in Liparota.

This Court also reiterated that strict liability is generally inappropriate when the offense is punishable by imprisonment or by other severe sanctions in United States v. United States Gypsum Co., 438

U.S. 422 (1978). "The existence of mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence," the Court noted, 438 U.S. at 436, quoting Dennis v. United States, 341 U.S. 494, 500 (1951). Citing Morissette, the Court construed the criminal antitrust provisions of the Sherman Act to require an intent element. The imposition of harsh criminal penalties on a strict liability basis, the Court observed, "would be difficult to square with the generally-accepted functions of the criminal law." Id., 438 U.S. at 442.

In the recent case of Liparota v. United States, supra, the Court interpreted ambiguous provisions creating the offense of food stamp fraud to include an element of mens rea. Again, this Court followed Morissette to construe the ambiguity in Defendant's favor under the rule of lenity, and the case raised no constitutional issue. But the Court noted that while generally, definition of the elements of an offense is entrusted to the legislature, "Congress must act within any applicable constitutional constraints in defining criminal offense." 105 S. Ct. at 2087, n. 6. See also Lambert v. California, 355 U.S. 225 (1957) (due process limits power of states to create strict liability for violation of a felony registration ordinance of which Defendant would likely have no notice).[7]

In this regard, see also United States v. Launder, 743 F. 2d 686

(9th Cir. 1984), and United States v. Wulff, 758 F. 2d 1121 (6th Cir. 1985).

III. Due Process considerations also compel reversal of the conviction, given the fact that the state prosecuted Petitioner for her reliance on the state's own representations as to the performer's identity.

An essential factor in determining whether Petitioner's conviction violated the due process clause is the undisputed evidence that Rachelle Reynolds did not act alone in misrepresenting her age and identity to Petitioner. The State of Minnesota was an active and crucial participant in that misrepresentation. In granting employment to Rachelle Reynolds, plainly relied upon an identification card issued by the State of Minnesota, plainly for the purpose of establishing an individual's identity and date of birth. The issuance of the card is mandated by Minnesota Statutes Section 171.07, Subd. 3, which provides as follows:

> "Upon payment of the required fee the department [of Public Safety] shall (emphasis supplied) issue to every applicant therefor a Minnesota Identification Card. The department may not issue a Minnesota identification card to a person who has a driver's license, other than an instruction permit. The card must bear a distinguishing number, assigned to the applicant, a colored photograph, the full name, date of birth, residence address, a description of the applicant in a manner the commission deems necessary, and a space upon which the applicant shall write the usual signature and date of birth of the applicant with pen and ink.

> Each Minnesota Identification Card must be plainly marked 'Minnesota Identification -- not a driver's license.' The fee for a Minnesota Identification Card issued to a person who is mentally retarded, as defined in Section 252.A.02, Subdivision 2 is 50 cents."

Plainly, the statute is intended for the purpose of according every person who is not a licensed driver a state-sanctioned method of establishing his or her identification and date of birth. In fact other Minnesota statutes specifically establish the Minnesota Identification Card as sufficient proof of identification and age to qualify for senior citizens benefits,[8] and for the purpose of purchasing liquor.[9]

Plainly then, when the State of Minnesota issued Rachelle Reynolds an official identification card, identifying her as Sheryl Reynolds, age 26, it did so plainly for the purpose of permitting her to establish her identity and age for all lawful purposes, including employment. Equally clear is the fact that due process of law precludes the state, as a matter of law, from imposing criminal liability upon Appellant for her reliance upon the state's own misrepresentations.

In Raley v. Ohio, 360 U.S. 423 (1959), the United States Supreme Court reversed contempt convictions for witnesses appearing before the Ohio Un-American Activities Commission, in a situation in which the chairman and members of the commission affirmatively represented that

the witnesses had a privilege not to answer questions they believed would incriminate them. Despite exercising the privilege commission members had indicated was available to them, the Defendants were prosecuted under the theory that the Ohio Immunity Statute removed the threat of criminal prosecution, thus making a self-incrimination claim unavailable to them. This Court held that due process prohibited the State from criminally punishing conduct the state's own agents represented was permissible. This Court stated:

> "While there is no suggestion that the commission had any intent to deceive the appellants, we repeat that to sustain the judgment of the Ohio Supreme Court on such a basis after the commission acted as it did would be to sanction the most indefensible sort of entrapment by the state --convicting a citizen for exercising a privilege which the state clearly had told him was available to him." 360 U.S. at 437-438.

Similarly, in Cox v. Louisiana, 379 U.S. 559 (1965), this Court reversed the conviction of a civil rights leader who was convicted of violating an East Baton Rouge, Louisiana ordinance prohibiting picketing "near a courthouse." The facts giving rise to the arrest were that the leader had conducted a demonstration approximately 101 feet from the courthouse, across the street, in a location for which permission to picket had been specifically granted by city officials, including the

police chief. The Court held, relying on Raley v. Ohio, supra, that the permission granted by the highest police officials to hold the demonstration where it was held constituted a representation that holding the demonstration at that location did not constitute demonstrating "near" a courthouse, within the meaning of the ordinance.

Subsequent decisions of both this Court and various lower federal courts have repeatedly reinforced the due process mandates of Raley and Cox. In United States v. Laub, 385 U.S. 475, (1967), this Court stated the following:

> "Ordinarily, citizens may not be punished for actions taken in good faith reliance upon authoritative assurance that punishment will not attach." Id. U.S. at 487.

See also United States v. Pennsylvania Chemical Corp., 411 U.S. 655 (1973), and United States v. Brady, 710 F. Supp. 290 (D. Col. 1989).

The Minnesota Court of Appeals rejected this plainly compelled result by the one sentence assertion that "the State of Minnesota did not affirmatively participate in the conduct which lead (sic) to the criminal violation." 464 N.W. 2d at 590.

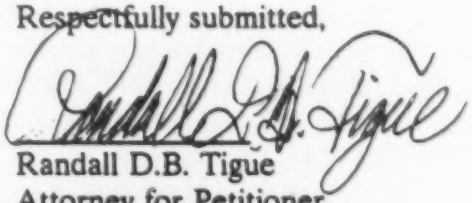
The record in this case plainly does not support the Court of Appeals' finding, since the undisputed testimony was that but for the state's affirmative act in issuing an identification which, in effect, told

Petitioner that it was lawful to hire Rachelle Reynolds, Rachelle Reynolds never would have been hired.[10]

Conclusion

For all of the foregoing reasons, Petitioner's Petition for Writ of Certiorari, should be in all respects granted.

Respectfully submitted,



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Dated: June 7, 1991.

[1]As already mentioned, supra, the full text of Minnesota Statutes Section 617.246 is set forth in the Appendix at A.89.

[2]See Minnesota Statutes Section 617.246, Subd. 5. Because the issue of the construction of the statute is a matter purely of state law, the issue is not presented to this Court for review, except to the extent that it impacts upon Petitioner's due process argument, infra.

[3]It should be noted that this is precisely the same procedure used by Officer Christensen to attempt to check Ms. Reynolds' identification at the time he arrested here. See T. 49, 56-57. In this regard, Officer Christensen admitted that had he not had the information from Woodland Hills Detention Center identifying Michelle Reynolds as a minor, it is possible that he would have been fooled by the identification as well. See T. 57.

[4]In this regard, it should be also noted that Rachelle Reynolds, in her testimony, verified that Petitioner made her complete and sign a W-4 form (T. 82).

[5]See California v. LaRue, 409 U.S. 109, Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, (1981); and Koppinger v. City of Fairmont, 311 Minn. 186, (1976). See also Miller v. Civil City of Southbend, 904 F. 2d 1081 (7th Cir. 1990), cert granted sub nom., Barnes v. Glen Theater, Inc., __ U.S.___, 111 S.Ct. 38, 112 L.Ed. 2d 15 (1990).

[6]Respondent's argument below that White could have ascertained the falsity of the identification presented by Sheryl Reynolds by "checking out" her social security number is transparently without merit. To begin with, the Social Security Administration specifically prohibits the release of information concerning individuals' social security numbers. See Title 45 C.F.R. Section 5.67(c). See also Title 42 U.S.C. Section 408 making unauthorized disclosure of social security numbers a criminal offense. At trial, Eve White testified, without contradiction, that her attempts to verify social security numbers uniformly met with frustration, since the Social Security Administration would not give out written numbers without written permission, and even upon receipt of written permission it would take from six weeks to six months to get the information back, making it impossible to hire as a practical matter (T. 434-435). More importantly, however, even if it were possible to "check out" a social security number, that would, by no means, guarantee freedom from prosecution. Had Rachelle Reynolds stolen her sister's social security card, as well as her birth certificate, "checking out" the social security would have done nothing more than further verify the false identification. Petitioner would nonetheless be subject to prosecution under Section 617.246, since no effort at verification, no matter how extensive, could ever constitute a defense under the statute.

[7]The only modern Supreme Court decision to have upheld strict liability for a felony offense, United States v. Freed, 401 U.S. 601 (1971), illustrates the inappropriateness of strict liability for the offense at issue in this case. In Freed, this Court distinguished the crime of possessing unregistered hand grenades from a serious, malum in se crime of the type considered in Morissette: "This is a regulatory measure in the interest of public safety." 401 U.S. at 609. Strict liability as to the hand grenade's registration status was appropriate because "one would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly dangerous offensive weapons." Id. The Defendant, having undertaken to possess such a weapon, would have at least

constructive knowledge of the legal requirement of registration, and would be able to ascertain beyond any doubt the weapon's registration status.

The statute in Freed did not, however, eliminate the element of criminal intent entirely, however, and if the Defendant did not know the hand grenade was a weapon, e.g., believed it to be an artichoke, or did not knowingly possess it, he could not be convicted. Thus the mistake of fact defense would still be available to negate the existence of mens rea.

The present case, of course, involves First Amendment activity which is not properly the subject of strict liability, and a factual element which the Defendant often is unable to determine with complete certainty. As in Freed, because reasonable mistake as to that fact would negate any criminal intent whatsoever, evidence of such mistake must be admissible by way of defense.

[8]See Minnesota Statutes Section 171.07, Subd. 3a.

[9]See Minnesota Statutes Section 340A.53.

[10]In this regard, it should be noted that in Raley v. Ohio, supra, United States Supreme Court clearly held that it was irrelevant whether the representation relied upon by the citizen to his detriment was deliberately fraudulent or not. See 360 U.S. at 437-438.